NO. 21559

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM EDWARD ROSE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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TABLE OF AUTHORITIES

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I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in a one-count indictment following a non-jury trial.

The offense occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 1407 and 3231. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF THE CASE

Appellant was charged in a one-count indictment with failure of a narcotic addict and user (American citizen) to register and surrender a registration certificate upon return and entry into the United States at the port of San Diego (San Ysidro), California, in violation of Title 18, United States Code, Section 1407 [C. T. 3]. 1/

Appellant's Motion to Dismiss or Set Aside Indictment was denied on August 1, 1966 [C. T. 4; Supplemental Record, p. 2]. Court trial commenced on August 16, 1966, before United States District Judge Fred Kunzel, and appellant was found guilty as charged on that date [R. T. 4-6]. 2/

Thereafter, on September 8, 1966, imposition of sentence was suspended, and appellant was placed upon probation for five years [C. T. 16]. He subsequently filed a timely notice of appeal [C. T. 17].

III

ERROR SPECIFIED

Appellant has specified the following points upon appeal:

"1. The District Court erred in failing to

1/ "C. T." refers to the Clerk's Transcript.

2/ "R. T." refers to the Reporter's Transcript on Appeal.

strike from the indictment the portion thereof alleging that defendant-appellant was a 'user' of narcotics.

"2. The District Court erred in failing to dismiss the indictment.

"3. The statute under which defendant-appellant was indicted, tried and sentenced, to-wit: Title 18, U. S. C., Section 1407, is unconstitutional in whole or in part when applied to appellant." (Appellant's Opening Brief, p. 4.)

IV

STATEMENT OF THE FACTS

Appellant entered the United States from Mexico at San Ysidro, California, on May 29, 1966. He failed to register under Title 18, United States Code, Section 1407. At that time he was a citizen of the United States [C. T. 14-15].

Appellant was examined by Dr. Paul R. Salerno on the same date. Dr. Salerno observed three recently-made needle marks and five other needle marks upon appellant's arms, made other observations, and concluded that appellant was under the influence of narcotic drugs at the time of the examination. There was a stipulation concerning Dr. Salerno's qualifications as an expert in the matters involved in his testimony [C. T. 14-15].

V

ARGUMENT

A. SECTION 1407 OF TITLE 18, UNITED STATES CODE, IS NOT UNCONSTITUTIONALLY VAGUE.

Appellant contends that Section 1407 is unconstitutionally vague in regard to the term, "user". [3] This argument was rejected in Palma v. United States, 261 F. 2d 93 (5th Cir. 1958). In Palma the appellant unsuccessfully argued that Section 1407 and the regulations pursuant thereto "fail to define a proper standard of guilt by being vague and indefinite. . ." (note, pp. 94-95). The appellant's brief in Palma reveals that the question of alleged vagueness of the user term was raised in that appeal. [4]

The "uses" term compares favorably with many other words and phrases which have been upheld by the United States Supreme Court when attacked upon the ground of unconstitutional vagueness. A collection of a number of these cases appears in Jordan v. DeGeorge, 341 U. S. 223, footnote at pp. 231-32 (1951).

Since it is not difficult to conjure hypothetical factual situations in which nearly any criminal statute may be assailed with

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3/ The statute actually employs the term, "uses".

4/ It is a proper practice to refer to appellate briefs in order to determine whether a particular question was raised upon appeal, e. g., Murphy v. Waterfront Comm'n., 378 U. S. 52, 65-66 (1964); Karrell v. United States, 247 F. 2d 706, 709-10 (9th Cir. 1957).

allegations of uncertainty or ambiguity, it is not surprising that the courts have placed a narrow interpretation upon the vagueness doctrine. Thus it has been held that alleged uncertainty of language in one criminal statute "goes not to the sufficiency of the statute, but to the adequacy of the trial court's guidance to the jury by way of instructions in a particular case".

Scales v. United States, 367 U.S. 203, 223 (1961).

In Jordan, supra, the United States Supreme Court held that "difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness" (at p. 231).

This Court has held:

"The fact that in some cases it may be difficult to determine the side of the line on which a particular fact situation falls is not sufficient reason to hold the language too ambiguous to define a criminal offense."

Turf Center, Inc. v. United States, 325 F.2d 793, 795 (9th Cir. 1963).

If a blanket indictment of vagueness would be sufficient to nullify all statutes containing a hint of uncertainty of meaning, then we would no longer be able to state that the interpretation of statutes is a vital function of the courts. However, it should be added that appellee does not concede that the "uses" term is uncertain or vague. Furthermore, assuming arguendo that the "uses" term is unconstitu-

tionally vague, appellant may not complain, because the conviction may rest upon the alternative ground that appellant was a narcotics addict. The "user" term would then be surplusage. Surplusage in an indictment may be disregarded as immaterial.

Ford v. United States, 273 U. S. 593, 602 (1927).

B. SECTION 1407 OF TITLE 18, UNITED STATES CODE, DOES NOT VIOLATE THE PRIVILEGE AGAINST SELF-INCRIMINATION.

Appellant contends that the registration requirement of Section 1407 violates the Constitutional privilege against self-incrimination. The courts have consistently held otherwise.

Reyes v. United States, 258 F. 2d 774, 778-82 (9th Cir. 1958);

Palma v. United States, supra, 261 F. 2d 93, 95 (5th Cir. 1958);

United States v. Eramdjian, 155 F. Supp. 914, 925-29 (S. D. Cal. 1957). 5/

5/ The question of the constitutionality of Section 1407 is also before this Court in four other cases pending at the time of the preparation of this brief:

Sharon Jeanne Weissman v. United States, No. 19974;
Jimmie Merl Mason v. United States, No. 20233;
Conrad Allen v. United States District Court, No. 20948;
Willie Ray Spain v. United States, No. 20888.

Appellant contends that the law has changed, citing a number of cases, including Murphy v. Waterfront Comm'n., 378 U.S. 52 (1964); Russell v. United States, 306 F.2d 402 (9th Cir. 1962); Hoffman v. United States, 341 U.S. 479 (1951); and Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965). Each of these cases will be discussed below in order to analyze their possible impact upon the decisions in Reyes, Palma and Eramdjian.

1. The Effect of Murphy v. Waterfront Comm'n.

Murphy holds that the self-incrimination protection includes answers sought in a state proceeding if those answers tend to incriminate the witness in connection with a Federal criminal statute. The decision also holds that the same rule applies where the Federal government compels testimony which would be incriminatory in connection with state criminal legislation (p. 53, note 1).

There are several reasons for rejecting the theory that Murphy has silently overruled Reyes and Palma. In the first place, Murphy does not apply to Section 1407 because registration under that statute does not involve the admission of commission of any state crime. Registration is required of citizen narcotic addicts, users, and prior convicted violators. It is not a crime in California to have the status of an addict or user. While it is a misdemeanor to use narcotics in California, 6/ the Section 1407 registrant admits

6/ California Health and Safety Code, Section 11721.

no use within the state. Proof of venue is essential in a California criminal prosecution.

People v. Parks, 44 Cal. 105 (1872).

Appellant is incorrect in his assertion that it is a California crime to be addicted to the use of narcotics (Appellant's Opening Brief, p. 20).

Robinson v. California, 370 U.S. 660, 667 (1962).

Appellant states that "Perhaps the greatest danger confronting appellant had he registered" was a state commitment for treatment for narcotic addiction. 7/ However, such a proceeding is civil in nature, not criminal.

In Re De La O, 59 Cal. 2d 128 (1963), cert. denied, 374 U.S. 856 (1963);

1 San Diego Law Review 68-69.

A careful reading of the United States Supreme Court decision in Robinson, supra, leads to the clear conclusion that the Supreme Court also regards state compulsory confinement and treatment of narcotics addicts as a civil proceeding (at p. 665, note 7).

There can be no self-incrimination based upon fear of civil action in the courts.

Furthermore, assuming arguendo that registration would involve potential self-incrimination in regard to state law, the remedy would be in the protection of the registrant at the time of

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7/ Appellant's Opening Brief, p. 21.

the attempted testimony in the state court. The undesirable alternative would be the elimination of Section 1407 in the face of the "strong presumption of constitutionality due to an Act of Congress", 8/ as well as the sacrifice of several analogous Federal registration statutes, depending upon the inclinations of the state legislatures in each of 50 states.

In Murphy, the Supreme Court held (at p. 79) that the witnesses in the state proceeding would be compelled to give the answers but that the Federal government would be prohibited from using the compelled testimony and its fruits in a Federal criminal prosecution. A similar protection could be invoked in regard to Section 1407 in the unlikely event that the state would attempt to offer compelled evidence in some subsequent criminal protection. Indeed, under the rule of Adams v. Maryland, 347 U.S. 179, 181 (1954), this protection already exists.

In Stone v. United States, 357 F.2d 257 (5th Cir. 1966), the appellant contended that registration under 26 U.S.C.A. 4411 and other statutes might serve as a "link in a chain" in regard to past crimes under another Federal statute. The Court indicated (at p. 259) that the question should be raised at the subsequent trial.

Even if it be assumed that Murphy overrules one of the arguments in Eramdjian and Reyes, there would be no effect upon the other alternative arguments expressed in those decisions.

8/ United States v. Di Re, 332 U.S. 581, 585 (1948).

2. The Effect of Russell v. United States and Hoffman v. United States.

In Russell, supra, this Court held that the firearm registration requirement of 26 U. S. C. A. 5841 was unconstitutional because the registrant would necessarily admit possession, and "proof of possession establishes prima facie, a violation of that section" (at p. 411). As a practical matter, every registrant would admit prima facie guilt. There is no comparison with Section 1407, because no Section 1407 registrant admits commission of any crime (except possibly under the prior convicted violator provision, which is not under attack in this appeal).

Appellant also quotes the "link-in-the-chain" discussion which appears in Russell and Hoffman, supra. It might be argued that registration would provide some "link-in-the-chain" leading to prosecution for another crime. This argument might be applied to all statutes which require registration or the completion of forms. To carry the argument to its logical extreme, if California should enact a law requiring persons in the southern part of the state to file state income tax returns in Los Angeles and persons in the north to file the returns in San Francisco, it could be argued that the Federal income tax laws would be unconstitutional because the compulsory acquisition of the Federal taxpayer's address would provide a "link-in-the-chain" in a state prosecution for failure to file the state tax return at the specified city. The Federal taxpayer's involuntary signature also might be a "link-in-the-chain"

in a future state forgery prosecution. These examples demonstrate the possible consequences of an unlimited extension of the "link-in-the-chain" principle. The courts have not gone so far.

The appellate courts have recently considered several cases in which the appellants unsuccessfully raised Fifth Amendment contentions in connection with statutes analogous to Section 1407. Under 21 U. S. C. A. 176a, and Title 19, United States Code, Sections 1459, 1461, 1484, and 1485, marihuana which is imported into the United States must be declared to customs officers. If it comes in by vehicle, a manifest is required under 19 U. S. C. A. 1459. In addition, the consignee of the merchandise must make an entry in writing and a declaration under oath.

19 U. S. C. A. 1484;

19 U. S. C. A. 1485.

Since possession of marihuana is a crime in most jurisdictions, including California, the consignee might argue that the mandatory documents would furnish a "link-in-the-chain" in a potential state prosecution. However, this Court recently held that 21 U. S. C. A. 176a does not violate the self-incrimination privilege.

Browning v. United States, 366 F. 2d 420, 422 (9th Cir. 1966).

Under 26 U. S. C. A. 4741 and 26 U. S. C. A. 4742, the transferee of marihuana is required to pay a special tax upon each transfer and to furnish a written order. One copy of the order form is preserved in the records of the internal revenue district. It also might be argued that these statutes tend to furnish a "lead" or

"link-in-the-chain" in regard to future state prosecutions. However, this Court held that 26 U. S. C. A. 4742(a) does not violate the self-incrimination privilege.

Browning, supra, at p. 422.

The Fifth Circuit held that 26 U. S. C. A. 4741 does not violate the self-incrimination privilege.

Haynes v. United States, 339 F. 2d 30, 31-32 (5th Cir. 1964), cert. denied, 380 U. S. 924 (1965).

It might be argued that these cases were decided upon the theory that the other crimes would be future crimes. However, this is not the case, because the other crimes have already been committed by the time that the documents are required.

Browning and Haynes were both decided after Murphy (June 15, 1964).

It also is noteworthy that Reyes, Palma and Eramdjian were decided long after the "link-in-the-chain" statement appeared in Blau v. United States, 340 U. S. 159, 161, in 1950, so this argument has already been held inapplicable to a Section 1407 registration by this Court in Reyes.

3. The Effect of Albertson.

In Albertson, supra, the Supreme Court applied the self-incrimination privilege to the statutory requirement of registration by Communist Party members in absence of registration by the

Party itself. However, unlike the Section 1407 registration, the registration in Albertson would have practically amounted to a confession of crime by every registrant under the provisions of 18 U. S. C. A. 2385 and 50 U. S. C. A. 841 and the conclusions reached in Communist Party of United States v. United States, 331 F. 2d 807, 812 (C. A. D. C. 1963), cert. denied, 377 U. S. 968 (1964), and the dissenting opinion of Justice Brennan (author of the Albertson opinion) in Communist Party v. Control Board, 367 U. S. 1, 198-99 (1961).

Furthermore, registration in Albertson involved self-incrimination in connection with potential Federal prosecution, while Section 1407 does not. Appellant cites 21 U. S. C. A. 174 and 21 U. S. C. A. 178 and suggests that a registration would be received in evidence under these statutes. If this would be objectionable, the objection should be made when the evidence is offered. This appears to be the reasoning applied to consideration of another statute's constitutionality in Stone, supra, decided after Albertson.

Appellant also states that registration would entail an admission of commission of the crime of failing to register upon leaving the United States under Section 1407. However, appellant has not shown that he falls within this classification.

> "A litigant can be heard to question the constitutionality of a statute only when and insofar as he at least claims to be damaged by its operation."
>
> Atherton v. United States, 176 F. 2d 835, 841 (9th Cir. 1949), cert. denied, 338 U. S. 938

(1950);

citing: Alabama State Federation of Labor, etc. v. McAdory, 325 U.S. 450 (1945).

A third distinguishing feature between Albertson and the instant case is the fact that no tribunal is available under Section 1407 to test a claim of the privilege, so the rule of United States v. Sullivan, 274 U.S. 259 (1927) is applicable. In Sullivan, the Supreme Court held that where one claims that an income tax return called for self-incriminatory answers, he should raise the objection in the return but could not refuse to make any return at all. Albertson emphasizes the desirability of having a tribunal act as "the final arbiter of the merits of the claim" of self-incrimination (at p. 79). A potential Section 1407 registrant may not silently raise and hear his own claim of self-incrimination and then rule in his own favor.

In United States v. Grosso, 358 F. 2d 154, 164 (3rd Cir. 1966), the appellant contended that the wagering tax return, required under 26 U.S.C.A. 4401, violated the privilege against self-incrimination because there was a "possibility of exposure to prosecution under local law" (at p. 164). The appellate court rejected the contention upon two grounds, including the following:

> "If, as the appellant now contends, the form of return would call for the disclosure of potentially incriminatory information, the objection should have been raised in the return." (at p. 164).

Appellant stands in the same position. Since Grosso (March 25, 1966) and Browning (September 8, 1966) were decided after Albertson (November 15, 1965), it is evident that Albertson and prior decisions (including Murphy) do not require the emasculation of Section 1407, which was described by the trial judge as "one of the most salutary statutes we have on the books today" [R. T. 6].

C. SECTION 1407 OF TITLE 18, UNITED STATES CODE, DOES NOT UNCONSTITUTIONALLY RESTRICT THE RIGHT TO TRAVEL.

The mere requirement of filling and surrendering a registration certificate does not constitute a violation of the right to travel.

> Reyes, supra, 258 F. 2d 774, 778, 782-83 (footnote).
>
> "'The right to travel is not an absolute one, free of all restraint or regulation.'"
>
> Reyes, supra, at 783 (footnote).

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment in the Court below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Phillip W. Johnson
PHILLIP W. JOHNSON